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Supreme Court, U.S.
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No. 93-1923

In the Supreme Court of the United States

OCTOBER TERM, 1994

AYUDA, INC., ET AL., PETITIONERS

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals, on remand from this Court in light of *Reno* v. *Catholic Social Services, Inc.*, 113 S. Ct. 2485 (1993) (*CSS*), permissibly declined to remand this case to the district court for proceedings to determine whether individual aliens who are not parties to this case (which has not been certified as a class action) might have had their applications for legalization under the Immigration Reform and Control Act of 1986 rejected for filing ("front-desked").

2. Whether the court of appeals correctly followed this Court's decision in *CSS* by ruling that the district court lacked jurisdiction over petitioners' challenge to the validity of INS legalization regulations and policies.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 7 F.3d 246. The order denying the suggestion of rehearing en banc (Pet. App. 27a-29a) is reported at 14 F.3d 61.

This Court's order vacating the prior judgment of the court of appeals and remanding for further consideration (Pet. App. 30a) is reported at 113 S. Ct. 3026. The prior opinion of the court of appeals (Pet. App. 31a-94a) is reported at 948 F.2d 742, and the order of the court of appeals on denial of rehearing en banc of that decision (Pet. App. 95a-106a) is reported at 958 F.2d 1089.

This Court's order vacating the initial judgment of the court of appeals and remanding for further consideration (Pet. App. 107a) is reported at 498 U.S. 1117. The initial opinion of the court of appeals (Pet. App. 121a-207a) is reported at 880 F.2d 1325. The orders denying rehearing and rehearing en banc of the initial decision (Pet. App. 208a-215a) are unreported.

Related opinions of the court of appeals (Pet. App. 108a-120a, 216a-245a) are reported at 919 F.2d 153 and 869 F.2d 1503.

Several opinions and orders of the district court (Pet. App. 246a-295a, 298a-308a, 322a-324a) are reported at 687 F. Supp. 650, 700 F. Supp. 49, and 744 F. Supp. 21. Other opinions and orders of the district court (Pet. App. 296a-297a, 309a-321a, 325a-332a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1993, and a petition for rehearing was denied on January 27, 1994. Pet. App. 25a-26a. On April 13, 1994, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including May 27, 1994, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises out of a challenge to an Immigration and Naturalization Service (INS) regulation concerning the legalization program established by the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359. Among other things, IRCA provided a one-time opportunity for certain aliens residing illegally in the United States to acquire legal status by having their status adjusted to that of an alien lawfully

admitted for temporary residence. 8 U.S.C. 1255a. Pursuant to Section 1255a(a)(2)(B), nonimmigrant aliens who initially entered the country in a legal manner, but who later lost their lawful status, were entitled to legalization only if their unlawful status was "known to the Government."

The INS promulgated a regulation defining "known to the Government" to mean "known to the INS." 8 C.F.R. 245a.1(d) (1988). Petitioners challenged that regulation in the district court, which held the regulation invalid and issued several supplemental orders, including certain injunctive orders against the INS. See Pet. App. 34a-35a. The court of appeals vacated the district court orders. It concluded that the district court lacked jurisdiction because the petitioners' legal challenge did not fall within the narrow exception to the general rule that jurisdiction to review INS legalization determinations is exclusively vested by IRCA in the court of appeals (on judicial review of a final order of deportation, see 8 U.S.C. 1255a(f)(1) and (4)(A)), and not in the district court. Pet. App. 4a-5a; see *id.* at 121a-207a.

This case has come before this Court twice before, and on each occasion the Court granted the certiorari petition, vacated the judgment of the court of appeals, and remanded for further consideration in light of a then-recent decision of the Court—first, *McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), and then *Reno* v. *Catholic Social Services, Inc.*, 113 S. Ct. 2485 (1993) (*CSS*). On each remand, the court of appeals reconsidered the case in light of the recent decision of this Court and determined that the district court did not have jurisdiction and that certain claims were not ripe for review. Pet. App. 31a-94a; *id.* at 1a-24a. The instant petition seeks review of the decision of the court of appeals on the second remand.

1. Petitioners consist of five individual aliens and four organizations that counseled and advised aliens in connec-

tion with the legalization program established by IRCA. They filed suit in the United States District Court for the District of Columbia, contending that the INS's "known to the Government" regulation incorrectly interpreted the eligibility requirements set forth in Section 1255a. The government unsuccessfully challenged the jurisdiction of the district court, which ruled in petitioners' favor and enjoined the INS from applying the regulation. Pet. App. 246a-280a.

In a supplemental order (Supplemental Order V), the district court extended its original order to include aliens who had failed to provide the INS with quarterly or annual reports regarding their address, as required by Section 265 of the Immigration and Nationality Act (INA), 8 U.S.C. 1305 (1976). The court agreed with petitioners that the absence of such reports established that the status of such aliens was unlawful and "known to the Government." Pet. App. 284a-286a.

2. The government appealed Supplemental Order V, arguing that the district court's exercise of jurisdiction exceeded the limits established by IRCA and jurisprudential doctrines. The court of appeals agreed and reversed. Pet. App. 121a-207a. It reasoned that because "an alien could challenge, on appeal from a deportation order, an interpretive regulation which causes the INS to deny his legalization claim, it follows that the district court lacked jurisdiction to hear the same claim in a different forum." *Id.* at 136a.

The court of appeals also concluded that the INS's policy with respect to aliens whose unlawful status had been revealed to the government only by their failure to file reports as required by Section 265 of the INA was not final agency action for purposes of judicial review and that petitioners' challenge to the policy was not ripe. Pet.

App. 152a-163a. The court noted that the final INS authority on that point—the Legalization Appeals Unit—had not yet decided an actual case raising the issue, so that the government's policy was not sufficiently concrete to permit the district court challenge. *Id.* at 153a-154a, 156a-158a, 160a-162a.[1]

3. Petitioners filed a petition for a writ of certiorari, No. 89-1018. This Court granted the petition, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of *McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), which held that a district court may entertain certain challenges to procedures utilized by the INS in connection with the special agricultural worker amnesty program enacted by IRCA. Pet. App. 107a.

4. On remand, the court of appeals again concluded that the district court lacked jurisdiction over the case because IRCA, in 8 U.S.C. 1255a(f)(1) and (4)(A), vests exclusive jurisdiction in the courts of appeals for review of denials of legalization, on the alien's petition for review of a final order of deportation. Pet. App. 31a-94a.[2] The

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[1] The court of appeals denied petitioners' suggestion of rehearing en banc by a 5-4 vote. Pet. App. 208a-215a.

[2] On remand, the case was consolidated with two appeals from related orders entered by the district court. The first of those appeals was the government's challenge to a district court order (Supplemental Order XIV) that effectively granted work authorizations to aliens who claimed that they were eligible for legalization under the district court's "known to the Government" orders, although they had not filed timely applications for legalization under IRCA. Pet. App. 322a-324a. Supplemental Order XIV applies across the board to all aliens covered by petitioners' action. The district court's earlier order made it clear that that group included aliens who had failed to submit a timely application for legalization. See Supplemental Orders VII, IX, XI, XII (Pet. App. 286a-288a, 290a-295a, 298a-308a). Supple-

court of appeals explained that *McNary* "focused on the structural inadequacy of court of appeals review of the collateral constitutional claims presented in that case"; it therefore held that "if the statutory administrative and judicial review scheme provides meaningful court of appeals review of an alien's legal claim, then Congress intended that scheme to be exclusive—ousting the district court of jurisdiction to hear the sort of claim at issue here." *Id.* at 50a. In this case, the court reasoned that because petitioners' challenge to the INS's interpretation of the "known to the Government" requirement as applied to a particular alien's application could be adequately considered by a court of appeals on judicial review under 8 U.S.C. 1105a of a final order of deportation (*id.* at 43a-44a, 50a), the district court could not entertain a challenge to the regulations. *Id.* at 33a, 58a-60a, 64a.

The court of appeals also reaffirmed its prior holding that the issue concerning the filing of reports under Section 265 was neither final nor ripe (Pet. App. 51a-56a), explaining that in *McNary* the plaintiffs "did not ask the district court to preempt the INS's efforts to interpret IRCA's ambiguous provisions; the *Ayuda* plaintiffs' claims do." *Id.* at 52a-53a.[3]

5. Petitioners filed a second petition for a writ of certiorari, No. 91-1924. The Court granted that petition, vacated the judgment of the court of appeals, and re-

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mental Order XIV never went into effect, because the government obtained a stay from the court of appeals. Pet. App. 108a-120a.

The second appeal was petitioners' challenge to a district court order declining to order legalization of four individuals who improperly had obtained employment while holding nonimmigrant visas granted under subparagraphs (A) and (G) of 8 U.S.C. 1101(a)(15). Pet. App. 309a-315a.

[3] The court of appeals denied petitioners' suggestion of rehearing en banc by a 6-5 vote. Pet. App. 95a-106a.

manded the case for further consideration in light of *Reno* v. *Catholic Social Services, Inc.*, 113 S. Ct. 2485 (1993) (*CSS*). Pet. App. 30a.

6. On the second remand, the court of appeals again concluded that district court review was precluded and vacated the district court orders. Pet. App. 1a-24a. The court explained that under *CSS*, "a putative beneficiary under a statute such as the amnesty program does not have a ripe claim merely when an agency publishes a regulation that might bear on his right to the benefit." *Id.* at 8a (citing *CSS*, 113 S. Ct. at 2496). Rather, the court continued, the "claimant must at least apply and be denied the benefit before the claim ripens. Typically, when the claimant is denied the benefit, the claim is then ripe for adjudication." *Id.* at 8a-9a. The court further explained, however, that under *CSS*, once an alien's claim becomes ripe by virtue of the denial of the application, it falls under the exclusive judicial review provisions of IRCA, and review in the district court is barred. *Id.* at 9a-10a. The court of appeals noted in this regard that in *CSS*, the Court had limited the reach of *McNary*'s exception to IRCA's provision for exclusive jurisdiction in the courts of appeals to " 'procedural' objections that could not receive 'practical judicial review within the [statutory] scheme.' " *Id.* at 10a (quoting *CSS*, 113 S. Ct. at 2497).

In light of its jurisdictional/ripeness ruling, the court of appeals declined to remand the case to the district court for further proceedings. The court emphasized that this case differs from *CSS*, in which the case was remanded to the district court because members of a certified class had alleged that they actually had tried to file legalization applications but had been turned away (been "front-desked");[4] in

[4] "Front desking" was used by the Court to describe the prefiling rejection of applications at the front desk of an INS office. *CSS*, 113 S. Ct. at 2497-2498.

that situation, the court below explained, an alien could bring an action in district court under the *McNary* exception to require the INS to accept and adjudicate the application, although not to challenge an interpretation of IRCA's legalization standards by the INS. Pet. App. 11a. The court emphasized that in this case, by contrast, there was no certified class. The court noted that none of the five individual petitioners alleged that they had been front-desked, *id.* at 12a, and it concluded that under *CSS*, the organizational petitioners lacked standing to challenge the INS's interpretation of IRCA and would not in any event have been involved in front-desking because of the special procedures established by IRCA for aliens who were assisted by such organizations. *Id.* at 13a n.10.

The court of appeals disagreed with the view of Judge Wald in her dissenting opinion (see Pet. App. 15a-24a) that the case should be remanded to permit certification of a class at this juncture and then to permit identification of potential class members who might allege that they were front-desked. The court pointed out that petitioners had conceded at an earlier point in the case that there were no aliens in the proposed class who had been front-desked. *Id.* at 12a. It recognized that if an alien had actually been denied the opportunity to file a legalization application, the district court would have jurisdiction under *McNary* to ensure that the INS adjudicated the application. *Id.* at 14a. Quoting its second opinion in this case, however, the court concluded that "that is not this case; there was no evidence presented that any aliens (much less any of the five individual alien plaintiffs) were prevented from filing an application." *Ibid.* (quoting *id.* at 45a). The court of appeals also pointed out that the INS did not have a policy of "front-desking" aliens who did not satisfy the INS's interpretation of the "known to the Government" standard, and in fact had instructed its offices to accept all such

applications. *Id.* at 14a. Because there was "not the slightest indication that any of the five plaintiffs in [this] case suffered a harm that would confer limited jurisdiction on the district court (such as front-desking)," the court held that district court review is barred. *Id.* at 14a-15a.[5]

ARGUMENT

The court of appeals properly brought to a close this long-pending litigation challenging one aspect of the INS's implementation of the legalization program established by IRCA, for which the application period expired more than six years ago. The decision below is fully consistent with this Court's decision in *Reno* v. *Catholic Social Services, Inc.*, 113 S. Ct. 2485 (1993) (*CSS*), and does not conflict with decisions of any other court of appeals. Further review therefore is not warranted.

1. Petitioners contend (Pet. 12-22) that the court of appeals erred by not remanding this case to the district court for further fact-finding on front-desking and other possibly ripe claims. Petitioners assert that the court of appeals' failure to do so conflicts with the Ninth Circuit's orders remanding the *CSS* cases to the district court after this Court had remanded them to the court of appeals in light of its *CSS* ruling.

This Court remanded the two cases consolidated in *CSS* to the Ninth Circuit "with directions to remand to the respective District Courts for proceedings to determine which class members were front-desked." 113 S. Ct. at 2500. On remand, the Ninth Circuit, in turn, issued one-sentence orders remanding the cases to the district courts as ordered. *League of United Latin American Citizens* v.

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[5] The court of appeals denied petitioners' suggestion of rehearing en banc by an 8-2 vote. Pet. App. 25a-29a.

INS, 999 F.2d 1362 (9th Cir. 1993); *Catholic Social Services, Inc.* v. *Reno*, 996 F.2d 221 (9th Cir. 1993).

In the case at bar, by contrast, the Court remanded the case to the court of appeals "for further consideration in light of [*CSS*]." Pet. App. 30a. It did not direct the court of appeals to remand the case to the district court. The court below followed the mandate of this Court to consider the case further in light of *CSS*, and, after doing so, it rejected petitioners' request for a further remand as unnecessary on the particular facts and record of this case.

Petitioners challenge the court of appeals' characterization of the record, contending that it contains "clear and substantial evidence * * * demonstrating that applicants had been front-desked." Pet. 14; see Pet. 14-21. They assert that proceedings before special masters appointed by the district court and the evidentiary hearing in the district court revealed aliens who had been front-desked. Pet. 14-17.

The focus of the special master proceedings was to identify aliens who did not submit an application prior to the application deadline because they were misled by the prediction that they were ineligible and that their applications would be denied on the basis of the "known to the Government" regulation. Pet. App. 301a, 306a. From among the thousands of aliens who submitted documents to the special master, petitioners have not identified a single alien whose application (accompanied by the required fee) was rejected for filing at the front desk. At the August 1990 hearing, two aliens testified that they were told they were ineligible for legalization, but they did not testify that they had actually submitted an application (with the fee) to a legalization office and that it had been rejected for filing. See Civil Docket No. 270, Tr. 158-166, 171-172, 193-196.[6]

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[6] The documents cited by petitioners as indications of front-desking (Pet. 16 n.11) do not support that view. The Defendants' Opposition

Petitioners attempt to avoid the import of the record evidence, however, by arguing (Pet. 17-18) that the court of appeals erred in relying on the fact that no class had been certified in this case. In their view, the court of appeals should have allowed for further proceedings in the district court to determine whether there might be any *potential* class members who were "front-desked."[7]

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to Renewal of Plaintiffs' Motions for Leave to Amend Complaint and for Class Certification (Civil Docket No. 280, at 1-3, 20-21) did not suggest the existence of front-desking evidence. The special master's report (Civil Docket No. 233) stated that some INS offices had taken the position that Section 265 claimants were ineligible for legalization and that many aliens must have self-disqualified; it made no mention of aliens who submitted an application that was rejected for filing. The testimony at the May 2, 1988, hearing (Civil Docket No. 75, at 35-36, 43-44) was based on the Brown and Bedor Affidavits. The Brown Affidavit (Civil Docket No. 40) and the Bedor Affidavit (Civil Docket No. 33) each complained that one legalization office refused to accept applications without a fee, which is not front-desking. The Tafoya Affidavit (Civil Docket No. 33) alleged that INS offices would recommend aliens' applications for denial (¶¶ 7, 8, 13); that INS offices believed a Section 265 violation did not qualify aliens for legalization (¶ 12); that the INS disseminated restrictive, vague or erroneous eligibility information (¶¶ 11, 14, 15, 16, 19, 20); and that INS offices advised aliens that they were ineligible and did not keep records of applications it rejected (¶ 20). The Tafoya Affidavit is not a persuasive indication of front-desking; it attests to knowledge of only three legalization offices, and each of those offices was taking applications but recommending them for denial, which is not front-desking. The court of appeals' conclusion that the record shows no evidence of front-desking is further supported by the fact that prior to the close of the application period on May 4, 1988, more than 1800 applications raising the Section 265 claim were received by the INS. Pet. App. 102a, 106a.

[7] Petitioners do not rely on claims by the individual petitioners to support their request for a remand to the district court. Judge Wald agreed that the individual named plaintiffs' claims could not support a remand. Pet. App. 18a n.1.

Petitioners' recounting of the history of the litigation to explain the absence of a certified class case simply confirms the appropriateness of the court of appeals' ruling. No class was ever certified and petitioners did not make a timely motion for class certification—the motion petitioners did make was three months out of time. Rule 203(b) of the United States District Court for the District of Columbia provides: "Within 90 days after the filing of a complaint in a case sought to be maintained as a class action, the plaintiff shall move for a certification under Rule 23(c)(1), Federal Rules of Civil Procedure, that the case may be maintained." Petitioners filed the complaint in early March 1988, and they filed the motion for certification in early September 1988, approximately 180 days after the filing of the complaint. Petitioners' motion to amend the original complaint was never granted,[8] so that the amended complaint was never properly before the district court or the court of appeals. Moreover, although the class definition in the amended complaint included aliens who were not allowed to file an application, none of the individual petitioners who were listed in the amended complaint alleged that they had tried to submit an application (with the fee) but had the application rejected by the INS.

Petitioners' effort to rebut (Pet. 19-20) the court of appeals' conclusion that they previously conceded that there was no front-desking is unpersuasive. According to petitioners, the court of appeals' prior opinion was actually discussing the INS's practice of making "recommended denials," not front-desking, and therefore any concession they made had nothing to do with front-desking. Pet. 20. In fact, however, the court of appeals' prior opinion discussed petitioners' argument that INS employees in the

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[8] Petitioners admit (Pet. 19) that the original complaint did not present any front-desking allegations.

legalization offices "were refusing to accept applications from section 265 applicants"—*i.e.*, were "front-desking" those aliens. See Pet. App. 154a. In response to that argument, the court of appeals stated that petitioners "conceded at oral argument—and our own review of the affidavits confirms—that, at most, *some* local INS offices were informing aliens that the office would *recommend* denial of applications based on the section 265 theory." *Ibid.*

There is no merit to petitioners' attempt to redeem their concession by arguing (Pet. 20-21) that a recommendation of denial might make out a "substantial cause" for an alien's failure to apply, and therefore might give rise to a ripe claim under *CSS*. See 113 S. Ct. at 2500 n.28. This Court did not hold in the footnote on which petitioners rely that such an alien would be entitled to any legalization relief under IRCA; the Court stated only that it could not rule out the possibility (which it termed "unlikely") that such an alien might have a ripe claim. Nor is it clear what relief could be awarded, since the filing of a timely application is an essential element of eligibility for legalization under IRCA. See 8 U.S.C. 1255a(a)(1)(A); *CSS*, 113 S. Ct. at 2504-2505 (O'Connor, J., concurring in the judgment); compare *Schweiker* v. *Hansen*, 450 U.S. 785 (1981).

In any event, under footnote 28 in *CSS*, the "substantial cause" of an alien's failure to apply would have to be traced to a policy of rejecting applications for adjudication at the front desk, not to a practice of accepting applications and then denying them (or recommending them for denial). Thus, the court of appeals did not err in concluding that, based on the record in this case, petitioners had not identified grounds for remanding this six-year-old case to commence proceedings on the front-desking issue.

The court of appeals also explained that, unlike in *CSS*, where an INS Manual had provided for the rejection of

certain applications, the INS had adopted a policy of accepting "known to the Government" applications and had issued instructions to accept such applications. Pet. App. 14a. Petitioners nowhere deny that the INS had adopted such a policy and instructions, and evidence of their existence was admitted during an evidentiary hearing at the very beginning of this case in March 1988.[9]

Thus, the D.C. Circuit's resolution of petitioners' case without further remand to the district court is based on the particular factual and procedural circumstances of this case. That resolution does not conflict with the orders of the Ninth Circuit remanding the *CSS* cases. There, this Court ordered the further remand to the district court in light of the class membership and a perceived need for further factual development in that particular situation. The fact-bound determination by the court below not to remand this case to the district court does not warrant this Court's review.[10]

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[9] The District Court Clerk's Record contains the transcript of the preliminary injunction hearing on March 25, 1988, and Defendants' Exhibits 1 and 2 entered into evidence therein (Civil Docket No. 51). At the hearing, an INS official testified (and the Exhibits demonstrated) that in November 1987, the INS announced and disseminated its policy of accepting applications from aliens who claimed eligibility under the "known to the Government" statutory provision, even though they did not satisfy INS's interpretation of the statutory provision. Throughout the litigation in the court of appeals, the INS repeatedly cited those documents and attached copies of them to the briefs it served on December 21, 1988, February 3, 1989, May 2, 1991, May 10, 1991, January 15, 1992, and July 14, 1993.

[10] In a footnote, petitioners suggest (Pet. 21 n.16) that this case merits review because it involves claims of individuals who filed timely applications based on Section 265 (*i.e.*, that they were "known to the Government" for purposes of 8 U.S.C. 1255a(a)(2)(B), by virtue of their failure to file with the INS certain required reports). According

2. Petitioners also contend (Pet. 22-26) that the court of appeals misinterpreted the jurisdictional holdings of *CSS* and *McNary*. Specifically, they argue that the court of appeals erred in interpreting *CSS* to mean that a legalization application must be filed and denied in order for a legalization claim to be ripe.

Petitioners cite no court of appeals decision that offers an interpretation or application of *CSS*'s jurisdictional analysis that conflicts with the court of appeals' reasoning.

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to petitioners (Pet. 21 n.16), those aliens have ripe claims because they timely applied, they took all the affirmative steps they could take, and, in a precedent decision (*Matter of H*, Interim Dec. No. 3205 (Assoc. Comm. June 11, 1993)), the INS has now announced its policy to deny Section 265 claims.

None of the five individual petitioners alleged that he or she was eligible under the Section 265 theory, and even the dissent below acknowledged that the individual petitioners did not provide a basis to support an order of remand to the district court. Pet. App. 18a n.1. The aliens upon whom petitioners rely—those who submitted documents to the special master—were not party plaintiffs and are not members of any certified class. Moreover, petitioners misread *Matter of H* as establishing a policy to deny Section 265 claims. That case established two steps for making out a Section 265 claim: an alien must show that he or she willfully failed to file an address report, and must further show that the INS had actual knowledge of that failure. In *Matter of H*, the alien satisfied the first step but not the second, and his claim therefore was denied.

In any event, judicial review is barred under *CSS*. To be ripe, the Section 265 claim must be presented by an alien's timely application, and the alien's pursuit of legalization on that theory must be concretely blocked by a denial of the application. At that point, however, judicial review of the denied application (and of the reasons for the denial) is available only in the court of appeals on review of a final order of deportation entered against the alien. *CSS*, 113 S. Ct. at 2496-2497; *INS* v. *Legalization Assistance Project*, 114 S. Ct. 422, 423 (1993) (O'Connor, J., in chambers). Thus, the district court has no jurisdiction over the Section 265 claims that petitioners would present to it for review.

Indeed, the Ninth Circuit has recently held, in agreement with the decision below, that district court review of challenges to the INS's interpretation of IRCA's legalization requirements is barred under *CSS*. See *Naranjo-Aguilera* v. *INS*, Nos. 92-16653 & 92-16933 (July 22, 1994); see also *Villarina* v. *INS*, 18 F.3d 765, 767 (9th Cir. 1994). The cases cited by petitioners (Pet. 25 n.19) do not deal with IRCA or *CSS*'s jurisdictional analysis, and accordingly do not conflict with the decision below.

Moreover, the court of appeals correctly interpreted *CSS*'s jurisdictional analysis. See *INS* v. *Legalization Assistance Project*, 114 S. Ct. 422, 423 (1993) (O'Connor, J., in chambers) (laying out essential elements of *CSS*'s jurisdictional analysis, which correspond to analysis of court below). In *CSS*, the Court stated that a class member's claim would ripen for judicial review only after he took the affirmative steps he could take before the INS blocked his path; that barrier ordinarily arises when the INS denies the application. 113 S. Ct. at 2496-2497. The court below similarly reasoned that the putative beneficiary under a statutory program such as that established by IRCA must at least apply for and be denied the benefit before the claim ripens. Pet. App. 8a-9a.

In *CSS*, the Court stated that once an applicant's claim ripens as a result of the denial of the application, the applicant is barred from seeking review in the district court, because the applicant is seeking a "determination respecting an application" that is reviewable on review of a deportation order. 113 S. Ct. at 2497. Likewise, the court below stated that an alien who is denied legalization has a ripe claim but is subject to IRCA's exclusive procedure for judicial review in the court of appeals. Pet. App. 8a-10a.

This Court stated in *CSS* that exceptions arise to this preclusion of district court review when procedural matters can receive no practical judicial review within the

exclusive statutory scheme, as the Court found to be the case with the procedural objections of the individual plaintiffs in *McNary* and with the front-desking claims in *CSS*. The court below recognized that those same exceptions exist under *McNary* and *CSS*. Pet. App. 10a.

Finally, petitioners object that the court of appeals "suggest[ed]" that *CSS* undermines what they characterize as the well-established jurisprudence that district courts may review challenges to INS regulations and policies. See Pet. 25-26. The court of appeals' statement was narrower—it stated only that the Court's ripeness analysis in *CSS* calls into question the cases that "permit substantive legal challenges prior to an alien applying for a benefit." Pet. App. 9a n.6. The court of appeals merely raised the question and did not answer it. This Court does not review mere observations in appellate opinions. See, *e.g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984) (the Court does "not ordinarily consider questions not specifically passed upon by the lower court"); *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471, 472 (1982) (judicial power to declare rights of individuals and measure the authority of government is to be exercised only to decide a real, earnest, and vital controversy).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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